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SECRETARY, BOARD OF
OIL, GAS & MINING

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**BEFORE THE BOARD OF OIL, GAS, AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

LIVING RIVERS, a non-profit association,

Petitioner,

v.

DIVISION OF OIL, GAS AND MINING,

Respondent,

EARTH ENERGY RESOURCES, INC.

Intervenor/Respondent

RESPONSE

OF

THE UTAH DIVISION OF OIL, GAS
AND MINING

TO

REQUEST FOR AGENCY ACTION

Docket No. 2010-027

Cause No. M/047/0090 A

The Utah Division of Oil, Gas and Mining, (Division) hereby responds to the Request for Agency Action filed by the Living Rivers, a non-profit association, as follows.

JURISDICTION AND STANDING

The Division denies that the Petitioner's allegations pertaining to standing accurately describe or characterize the Tavaputts Plateau and the area where the mine is proposed. However, the Division does not contest the standing of the Petitioner to bring this Request. The Division

agrees that the Board of Oil, Gas and Mining (Board) has authority pursuant to Utah Code §§ 40-8-4, 6, and 8; and Utah Admin. Code R647- 5-106 (17) to hear and decide this matter. This matter is to be heard in accordance with the rules of practice before the Board at Utah Admin. Code R641-100 et seq. (2010).

RESPONSE TO ITEMIZED ALLEGATIONS

1. The Division admits that Earth Energy Resources Inc. (Earth Energy) is the lessee of certain State Institutional Trust Lands Administration (SITLA) consisting of approximately 5930 acres of land that are leased for tar sands extraction; that Earth Energy has established a 2,255-acre study area and a 213 acres initial development area; and that it has proposed in the approved NOI to mine a 62-acre portion of the initial development area (North Pit). The Division concurs with the statements that the mining will require moving approximately 7.9 million cubic yards of material from the earth within this pit and that the material will result in a larger volume of approximately 9.7 million cubic yards of material that will be returned and reclaimed within the pit and on adjacent lands. The Division alleges that the details of the mining plan anticipates removal of the 'tar sands' and extraction of the oil on site, return of the overburden and interburden within the excavation area of the North Pit to the extent possible, and the placement of the remainder on the adjacent lands to be reclaimed to approximate original contour and re-vegetated at the conclusion of mining.

2. The Division denies that the NOI focuses exclusively on the North Pit and alleges that the NOI provides sufficient information about the environment and lands surrounding the proposed mine and provides sufficient information about possible future mining to satisfy the requirements for approval of the NOI. The Division's approval of the current NOI limits Earth Energy's approved mining to the North Pit. Any future mining on other lands leased by Energy Resources, including the area identified as the West Pit, will be subject to approval of final plans and designs in an amendment to the NOI, as they are submitted. The Division acknowledges that the bonding required does include rough calculations for reclamation of the proposed expansion to the West Pit.

PROCEDURAL HISTORY

This is the second appeal to the Board of the Division's decision to approve the NOI for this mine. The first appeal was filed by Southern Utah Wilderness Alliance (SUWA), and the Utah Chapter of the Sierra Club (Docket No. 201009-009, Cause No. M/047/0090) on January 11, 2010 as an appeal of the informal hearing decision of December 22, 2009, upholding the permit decision at an informal hearing. In that appeal Sierra Club and SUWA were represented by the Western Resource Advocates the same counsel as now represent Living Rivers in this appeal. The first appeal was preceded by an informal hearing before the Division Director and then appealed to the Board. That matter was resolved by a Stipulation between the parties on March 22, 2010 prior to the hearing. The Stipulation did not modify the permit application or

mining requirements except to commit the Division to give notice to the Petitioners written notice of any proposal to expand mining into the North Pit.

This second appeal was made possible by the failure of the Division to publish notice of its decision to approve the NOI in a newspaper in Grand County. The rules require that the Division publish notice of a decision to approve a large mine NOI in a newspaper in the county where the mine is located. Utah Admin. code R647-4-116(1) The proposed PR Springs mine is located in both Grand and Uintah Counties, and notice was inadvertently not published in a Grand County newspaper. Upon discovering its error the Division published notice in Grand County and an informal appeal was filed within the period allowed to file objections. An informal hearing was held in Salt Lake City on July 27, 2010 and the Division's decision was upheld by the Division Director on September 13, 2010. This appeal followed appealing that decision.

RESPONSE TO ARGUMENTS AND BASES FOR REQUEST FOR REVIEW

The Petitioner has set forth six arguments or reasons for vacating the decision to approve the NOI. The Petitioner is required by R641-104-133 and R6451-104-200 to allege in the RAA the basis for its appeal. Petitioners have conducted an informal hearing of this decision and counsel for Petitioner has previously filed an appeal of this same NOI on behalf of other groups with similar interests and objections and agreed to a settlement of all issues raised in that case. Unless the Petitioners can show that the Division has kept from them information that would be a

basis for alleging new or different issues than those set forth in this RAA, the Petitioner should be barred from presenting any additional arguments at the hearing. The Division and the applicant should not be faced with a continuous parade of evolving objections.

The Division responds to the six identified objections as follows.

1. Potential for Surface Water Quantity Impacts.

Living Rivers alleges that the NOI fails to include “the amount of water and sediment from runoff generated from the overburden and storage area” citing R647-4-109.1. This rule does not require the applicant to include in its application this information. Living Rivers further alleges that the information is needed to state what the impacts are and what the appropriate measures are that it will undertake to avoid or minimize environmental damage as required by other rules, R647-4-107.2 and .3; and 111.2 and .3.

These claims incorrectly state the rules and are also wrong in their conclusion that without such data the Division cannot evaluate the adequacy of the proposed mine plan to address the impacts to surface water quantity.

R647-4-109.1 requires in part that: “[T]he operator shall provide a general narrative description identifying the potential surface and/or subsurface impacts. This description shall include, at a minimum: 1. Projected impacts to surface and groundwater systems;” The plain language of the rule does not require that the application include “the amount of water and sediment from runoff generated from the overburden and storage area; . . .”. The narrative

description contained in the NOI does not contain this precise information (that is not required) but it does satisfies the rule by providing an adequate narrative description or the potential for impacts that is sufficient for the purpose of evaluating the capability of the mine plan to address and mitigate the potential impacts to the quantity of surface water to the extent required by the other cited rules R647-4-107.2 and 111.2.

The allegations that the excess runoff may adversely impact for water *quantity* shows a lack of appreciation for the nature of the environment where the mine is proposed. The application includes a required description of the streams and hydrology. This information documents that the mine is located in a dry area at the head of an ephemeral drainage that is more than 20 miles from the nearest perennial stream. If there were a potential for increased runoff to impact surface water *quantity*, it would most likely improve the conditions!

However, out of a concern for potential impacts to the occasional flows in the dry channels with sediment from runoff, the mine has been designed and the SPP has required actions to minimize water quality impacts from such runoff. The mine is designed for containment of the waters within the permit area and has no points of discharge. The potential for runoff from the overburden storage area and action to minimize it, is described in the application and the Stormwater Prevention Plan (SPP). Design standard for storm events that are typical for the mining industry were applied. Not only is the "actual amount of sediment that is expected to

reach the waters of the State” is not required by any rule, but given the terrain, hydrologic character of the area and the distance to the nearest perennial stream, it is a remote concern.

The Division personnel who have reviewed the plan are experts in the evaluation of mining impacts and the means to mitigate and prevent such impacts. Their expert evaluation of the mine plan is entitled to considerable weight and discretion. The rules are not objective standards but based on professional judgments and rely on the expertise of the agency and rather than a numerical limit. The Division staff made a professional evaluation of the potential impacts to surface water quantity and determined that the plan meets the requirements of the rules and the statute.

B. Potential Surface Water Quality Impacts.

The allegations of potential impact to surface water quality impacts first repeats the claims of impacts from the runoff from the overburden storage areas that were included in the surface water quantity impact allegations. As discussed above, the rules do not require a quantification of the amount of water runoff or a measurement of concentrations of TDS of other pollutants. The Division found that the NOI does address the potential for impact to water quality in numerous areas and does discuss the actions taken to minimize these potential impacts.

In addition, Living Waters alleges that “processed sands and fines” that will be deposited in the overburden area, will result in a “leachate from these tailings [that] could potentially migrate through the overburden/interburden storage areas and be transported off-site as surface

water.” The Petitioner has provided no basis for this conclusion, but rather suggests that the Division is required to make its determination that this will *not* happen. There is no such requirement in the rules and the descriptions of the potential for impacts to water quality in the NOI and the mine plan document that Earth Energy will limit discharges from the mine by design of the storage area and through the SPP requirements. The Division found that the analysis was adequate for the rules and there is no creditable evidence that there will be an escape of leachate from the storage areas.

Living Rivers states that the storage area is located on a tributary of Willow Creek, an impaired stream on Utah’s 303(d) list under provisions of the Clean Water Act and needing a TMDL plan. However, the 303(d) and TMDL analysis does not have application to a mine with no discharge permit. Also given the distance to the perennial stream it is unlikely that there will be any impact from mining to the TDS levels in Willow Creek that are above the natural conditions.

C. Potential Groundwater Quantity Impacts.

Living Rivers objections to the adequacy of the analysis of ground water quantity impacts is not that there isn’t data but merely that it disagrees with the conclusions reached in the NOI and by the Division regarding the nature of the ground water. Living Rivers provides no evidence that would support their contrary conclusions that there is an groundwater system that will be impacted. The conclusion of Earth Energy that there are local isolated aquifers in the

immediate area feeding seeps that will not be adversely affected and that the general piezometric surface is 1500 feet below the mine surface is supported by information submitted by Earth Energy and found by the Division to satisfy the rule R647-4-106.8 and 647-4-109. Living Rivers however, states that it disagrees and argues that Earth Energy is required to provide additional ground water data while failing to provide evidence to support its claims.

D. Potential Ground Water Quality Impacts.

Living Rivers does not identify any rule that they allege Earth Energy has violated with regard to the potential impacts to ground water quality beyond the rule that requires a narrative description of the projected impacts. Petitioners argue that the Division *should* require baseline data on the ground water quality for the mine area. There is no rule to this effect. It is not true that without this data an analysis of the potential impacts to the ground water cannot be made. The Division found that the analysis was complete and that the NOI demonstrated that impacts would be minimized.

E. Ophus Process.

The concerns about contamination from the chemicals used in the oil extraction process known as the Ophus Process are understandable, but Living Rivers has failed to review the information that has been provided by Earth Energy and which the Division found to adequately demonstrate that the process is not harmful to the environment. The application includes results of the tests of the use of the process chemical on a similar oil tar rock and the analysis of the

remaining materials for harmful chemical constituents. The tests demonstrated that the chemical does not result in a residue or by-product that might be harmful if it were to get into the ground or surface waters. The information concerning the process is appropriately protected under the GRAMA. The application has sufficient information for the Division to make an evaluation of the impacts from the process chemical and determine that it was not harmful in the event it were to get into the groundwater system.

F. The Reclamation Plan Outlined in the NOI is insufficient.

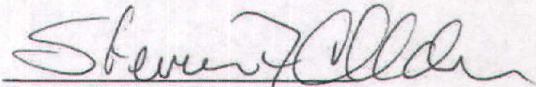
Living Rivers repeats the same allegations of contamination to the surface from the process chemicals and fines from the processed materials to allege that the reclaimed land will be contaminate ground water and surface waters. These arguments have been addressed above.

Beyond more concerns about contamination, there are no facts alleged to support the claim that reclamation as required is not provided for by the NOI. The claim should be dismissed since there are no facts alleged that show a failure to meet the requirements of the rules. The Petition ignores or disregard the sections on grading, and vegetation. Division has extensive expertise in reclamation and has found the plan to be complete and to satisfy the rules. The land is to be returned to the approximate original contours as shown on the proposed maps and revegetation must be complete and proven successful before the reclamation bond is released.

PRAYER FOR RELIEF

The Division's approval of the NOI should be upheld. The Petition is without any factual support for the many claims it makes of inadequacy. At its best, the Petition argues that the Division should have done more than the rules require, and at its worst it merely alleges the possibilities for concern without evidence to support the claims. The Division has carefully reviewed the application. The concerns regarding potential impacts to the surface and ground water have been evaluated, and found to meet the requirements of the rules. The application includes an SSP and satisfies the Division of Water Quality. There is no evidence the processing chemical is harmful and the Petition fails to even identify any reclamation requirements that have been violated.

Respectfully submitted this 19th day of October, 2010

A handwritten signature in dark ink, appearing to read "Steve Alder", written in a cursive style.

Steve Alder
Assistant Utah Attorney General
Counsel for Division of Oil, Gas and Mining

CERTIFICATE OF MAILING

The Undersigned affirms that he did mail and email a true and correct copy of the forgoing Response to the Request for Agency Action to the following persons and addresses on this ^{fl}~~20~~ day of October, 2010.

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